
HOUSE CONCURRENT RESOLUTION

REQUESTING THE HAWAII BANKERS ASSOCIATION TO OPINE WHETHER
MEMBER FINANCIAL INSTITUTIONS AND THEIR STAFF WHO CHOOSE TO
SERVICE MEDICAL MARIJUANA-RELATED BUSINESSES RISK CIVIL AND
CRIMINAL PROSECUTION UNDER FEDERAL LAW.

1 WHEREAS, pursuant to the federal Comprehensive Drug Abuse
2 Prevention and Control Act of 1970, 84 Stat. 1236, or more
3 commonly known as the federal Controlled Substances Act (CSA),
4 marijuana is a banned substance with no permissible medical use;
5 and
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7 WHEREAS, twenty-three states and the District of Columbia,
8 including the State of Hawaii, however, have legalized the use
9 of marijuana for medical purpose under state law; and
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11 WHEREAS, to clarify how the United States Department of
12 Justice would enforce the CSA in light of conflicting state law,
13 Deputy Attorney General James M. Cole wrote a memorandum to all
14 United States attorneys stating the principles the federal
15 government would use in the enforcement of the CSA; and
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17 WHEREAS, dated August 29, 2013, and simply known as the
18 "Cole Memorandum" (Cole Memorandum I), this document was
19 intended to serve notice to those states having laws that
20 legalize the use of marijuana the conditions under which the
21 federal government would enforce the federal law; and
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1 WHEREAS, Cole Memorandum I began by listing the areas in
2 which the Department of Justice had focused its efforts on
3 enforcement priorities that are particularly important to the
4 federal government:

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- 6 (1) Preventing the distribution of marijuana to minors;
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- 8 (2) Preventing revenue from the sale of marijuana from
9 going to criminal enterprises, gangs, and cartels;
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- 11 (3) Preventing the diversion of marijuana from states
12 where it is legal under state law in some form to
13 other states;
- 14
- 15 (4) Preventing state-authorized marijuana activity from
16 being used as a cover or pretext for the trafficking
17 of other illegal drugs or other illegal activity;
- 18
- 19 (5) Preventing violence and the use of firearms in the
20 cultivation and distribution of marijuana;
- 21
- 22 (6) Preventing drugged driving and the exacerbation of
23 other adverse public health consequences associated
24 with marijuana use;
- 25
- 26 (7) Preventing the growing of marijuana on public lands
27 and the attendant public safety and environmental
28 dangers posed by marijuana production on public lands;
29 and
- 30
- 31 (8) Preventing marijuana possession or use on federal
32 property; and
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34 WHEREAS, it next stated that these priorities will continue
35 to guide the enforcement of the CSA against marijuana-related
36 conduct, and that United States attorneys and law enforcement
37 should focus their enforcement resources and efforts, including
38 prosecution, on persons or organizations whose conduct
39 interferes with any one or more of these priorities, regardless
40 of state law; and

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1 WHEREAS, Cole Memorandum I continued that a system adequate
2 to that task must not only contain robust controls and
3 procedures on paper, it must also be effective in practice; and
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5 WHEREAS, jurisdictions that have implemented systems that
6 provide for regulation of marijuana activity "must provide the
7 necessary resources and demonstrate the willingness to enforce
8 their laws and regulations in a manner that ensures they do not
9 undermine federal enforcement priorities"; and
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11 WHEREAS, Cole Memorandum I concluded that "if state
12 enforcement efforts are not sufficiently robust to protect
13 against the harms set forth above, the federal government may
14 seek to challenge the regulatory structure itself in addition to
15 continuing to bring individual enforcement actions, including
16 criminal prosecutions, focused on those harms"; and
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18 WHEREAS, on February 14, 2014, Deputy Attorney General Cole
19 issued a second memorandum to all United States attorneys
20 providing "Guidance Regarding Marijuana-Related Financial
21 Crimes" (Cole Memorandum II); and
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23 WHEREAS, it began by stating that the provisions of the
24 money laundering statutes, the unlicensed money remitter
25 statute, and the Bank Secrecy Act (BSA) remain in effect with
26 respect to marijuana-related conduct, and that financial
27 transactions involving proceeds generated by marijuana-related
28 conduct can form the basis for prosecution under the money
29 laundering statutes (18 U.S.C. § 1960), and the BSA;
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31 WHEREAS, furthermore, Sections 1956 and 1957 of Title 18
32 make it a criminal offense to engage in certain financial and
33 money transactions with the proceeds of a "specified unlawful
34 activity", including proceeds from marijuana-related violations
35 of the CSA; and
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1 WHEREAS, transactions by or through a money transmitting
2 business involving funds "derived from" marijuana-related
3 conduct can also serve as a predicate for prosecution under 18
4 U.S.C. § 1960, and additionally, financial institutions that
5 conduct transactions with money generated by marijuana-related
6 conduct could face criminal liability under the BSA for, among
7 other things, failing to identify or report financial
8 transactions that involved the proceeds of marijuana-related
9 violations of the CSA; and

10
11 WHEREAS, notably for these purposes, prosecution under
12 these offenses based on transactions involving marijuana
13 proceeds does not require an underlying marijuana-related
14 conviction under federal or state law; and

15
16 WHEREAS, Cole Memorandum II made clear that ". . .
17 financial institutions and individuals choosing to serve
18 marijuana-related businesses that are not compliant with such
19 state regulatory and enforcement systems, or that operate in
20 states lacking a clear and robust regulatory scheme, are more
21 likely to risk entanglement with conduct that implicates the
22 eight federal enforcement priorities" [Emphasis added.]; and

23
24 WHEREAS, in addition, because financial institutions are in
25 a position to facilitate transactions by marijuana-related
26 businesses that could implicate one or more of the priority
27 factors, financial institutions must continue to apply
28 appropriate risk-based anti-money laundering policies,
29 procedures, and controls sufficient to address the risks posed
30 by these customers, including by conducting customer due
31 diligence designed to identify conduct that relates to any of
32 the eight priority factors; and

33
34 WHEREAS, the same day Cole Memorandum II was issued, the
35 Financial Crimes Enforcement Network (FinCEN) of the United
36 States Department of the Treasury issued guidance on "BSA
37 Expectations Regarding Marijuana-Related Businesses"; and



1 WHEREAS, the FinCEN guidance stated that "in general, the
2 decision to open, close, or refuse any particular account or
3 relationship should be made by each financial institution based
4 on a number of factors specific to that institution", and that
5 "these factors may include its particular business objectives,
6 an evaluation of the risks associated with offering a particular
7 product or service, and its capacity to manage those risks
8 effective"; and
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10 WHEREAS, commentators have stated that the FinCEN guidance
11 basically states that:
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- 13 (1) If a financial institution banking a marijuana
14 business knows it is engaging or facilitating
15 activities involving the eight enforcement
16 "priorities", then prosecution of the financial
17 institution may be appropriate;
18
- 19 (2) If the financial institution is "willfully blind" to
20 such activities by failing to conduct appropriate due
21 diligence, prosecution may be appropriate;
22
- 23 (3) If the financial institution offers services to
24 marijuana-related business whose activities do not
25 implicate any of the eight enforcement "priorities",
26 then prosecution may not be appropriate; and
27
- 28 (4) Nothing precludes investigation or prosecution even in
29 the absence of one of the eight priorities where
30 investigation or prosecution is warranted or serves an
31 important federal interest; and
32

33 WHEREAS, despite the "priority enforcement" guidance from
34 the United States Department of Justice and the United States
35 Department of the Treasury, many financial institutions still
36 remain leery of accepting deposits from a marijuana business for
37 fear that they could lose their charter, attract unwanted
38 attention from regulators or even risk prosecution for aiding
39 and abetting or money laundering; and
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H.C.R. NO. 136

1 WHEREAS, if financial institutions in Hawaii refuse to
2 serve medical marijuana-related businesses and individuals,
3 medical marijuana-related businesses and individuals will be
4 forced to rely solely on cash transactions; and
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6 WHEREAS, financing for capital improvements, disbursements
7 for employee salaries, equipment purchases, utility costs, and
8 all other financial transactions taken for granted in operating
9 a business would have to be done solely in cash; and
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11 WHEREAS, this would greatly increase the risks of operating
12 a medical marijuana-related business and possibly exacerbate the
13 proliferation of illegal activities; now, therefore,
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15 BE IT RESOLVED by the House of Representatives of the
16 Twenty-eighth Legislature of the State of Hawaii, Regular
17 Session of 2015, the Senate concurring, that this body requests
18 the Hawaii Bankers Association to opine whether member financial
19 institutions and their staff who choose to service medical
20 marijuana-related businesses risk civil and criminal prosecution
21 under federal law; and
22

23 BE IT FURTHER RESOLVED that the Hawaii Bankers Association
24 is requested to submit a report to the Legislature at least
25 twenty days prior to the convening of the Regular Session of
26 2016; and
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28 BE IT FURTHER RESOLVED that certified copies of this
29 Concurrent Resolution be transmitted to the Executive Director
30 of the Hawaii Bankers Association, the Governor, the Attorney
31 General, and the Director of Health.
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OFFERED BY: 

MAR 13 2015

